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CHEW HOCK SAN & ORS.

v.

CONNAUGHT HOUSING DEVELOPMENT SDN. BHD.
& ANOTHER CASE*b*FEDERAL COURT, KUALA LUMPUR
GEORGE SEAH FJ
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NOS. 144 & 146 OF 1984]
18 DECEMBER 1984*c*

CONTRACT: *Booking fee for shophouses accepted by respondent's clerk before official opening of booking - On official opening of booking appellants refused to accept offer of said shophouses at new price which was higher - Sued for specific performance - Whether respondent's clerk had authority to enter into the contracts with the appellants.*

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The appellants in the 1st appeal had brought 5 separate actions against the respondent. Subsequently, by order of the High Court dated 26 February 1982, the action brought by the appellant in the 2nd appeal was consolidated with the 5 other suits and all the 6 suits were heard together.

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The respondent, a licensed housing developer, was at the material time contemplating constructing shophouses for RM250,000 in Taman Connaught, Jalan Cheras, Kuala Lumpur. The appellants came to know about it in July 1979. The appellants each paid RM5,000 as booking fee to the respondent's clerk, although they knew that the official booking had not yet commenced. The respondent's clerk issued typewritten receipts acknowledging the payments. However the respondent's clerk kept the cheques which were not credited to the respondent's bank account until the day of the trial. When booking was officially opened the respondent was still prepared to offer the shophouses to the appellants but at a price of RM285,000 which was lower than the approved selling price of RM295,000. The appellants

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refused to accept the shophouses at RM285,000, lodged caveats on the land and filed actions for specific performance.

The trial Judge held that the respondent's clerk had no authority at the material time to accept booking on behalf of the respondent and that the respondent was not liable for the acts of its clerk. The appellants appealed.

*g***Held:**

[1] The 5 receipts issued by the respondent's clerk were not the official receipts of the respondent as they were typewritten copies and did not bear letterheads of the respondent.

[2] The respondent's clerk did not have actual authority to enter into the contracts with the appellants. On the facts, the respondent's clerk had no ostensible authority either. And any representation made by him was done without the knowledge and consent of the respondent.

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[Appeal dismissed with costs. Judgment of learned Judge confirmed.]

Cases referred to:

Freeman & Lockyer v. Buckhurst Part Properties (Mangal) Ltd. [1964] 2 QB 480

British Bank of the Middle East v. Sun Life Assurance Co. of Canada (UK) Ltd. [1983] 2 Lloyd's Rep 9

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Mahony v. East Holyford Mining Co. [1875] LR 869 HL

Clay-Hill Brick & Tile Co. Ltd. v. Rawlings [1938] 4 All ER 100

For the appellants (in Appeal 144/84) - R.R. Sethu (Abdul Rahman with him); M/s. Adnan, Sundra & Low **a**

*For the appellant (in Appeal 146/84) - R.R. Sethu (S.Y. Lai with him); M/s. K.P. Woon & Co.
For the respondent - P. Royan; M/s. Shook Lin & Bok*

JUDGMENT

Syed Agil Barakbah FJ: **b**

This was an appeal by the six appellants against the decision of the High Court Judge at Kuala Lumpur dismissing their claims against the respondent with costs. The suits were consolidated by Order of Court dated 26 February 1982 and were heard together by the learned Judge.

As the plaintiffs in the Court below, each of the appellants filed a writ for specific performance of a purported sale agreement in which they alleged to have paid a booking fee of RM5,000 each to the respondent's clerk for the purchase of 3½ storey shophouses at the price of RM250,000 each. They also prayed for a Court order for the execution of the sale agreement with the respondent to enable them to purchase the house at the said price on the ground that they had been denied the opportunity and the right to execute proper sale and purchase agreements for the property which they had booked earlier when the phase 3 housing project was subsequently opened by the respondent to the public. The learned Judge rightly concluded from the evidence before the Court that the claim for specific performance was founded on the receipts issued by the respondent's clerk (DW1) for the payment of the booking fee and on the allegation that DW1 at the material time was acting as the agent for the respondent. The respondent in their defence denied that any contract was concluded or could be inferred. They contended further and in the alternative that there was no enforceable contract between the parties until the execution of proper sale and purchase agreements. **c**
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In considering the issue whether there was any valid and enforceable contract between the parties, the crucial point, that arose before the learned Judge was whether DW1 at the material time had authority from the respondent to accept bookings on its behalf from the appellants and whether the respondent had held out that DW1 was so authorised. The learned Judge concluded from the evidence and the surrounding facts and circumstances of the case that DW1 had no such authority on the ground that the acceptance of the appellants' cheques and the issue of the receipts by DW1 were his personal acts for which the respondent could not be held liable. Further, the Judge was satisfied that the respondent had not represented to the appellants that DW1 was authorised to accept bookings on its behalf. **f**

The undisputed facts were that the respondent, a licensed housing developer, was at the material time involved in the construction and development of Taman Connaught at 5½ miles, Jalan Cheras, Kuala Lumpur. The development was in phases. Having completed phase 2, the respondent was contemplating to commence phase 3 which consisted, *inter alia*, of 66 shophouses to be constructed. The proposed price of each was RM250,000. The appellants came to know about it some time in July 1979 and on learning that one Mr. Liew (DW1) who was working in the respondent's office might be able to assist and arrange for the booking of the shophouses, the appellants approached DW1 in the respondent's office on separate occasions. They were told that the official booking had not yet commenced. However, the appellants issued cheques for RM5,000 each payable in the name of the respondent and handed them to DW1 who in turn issued typewritten receipts acknowledging the payments. DW1 kept the cheques which were not credited into the respondent's bank account until the day of the trial. The learned Judge accepted DW1 as a truthful witness whose evidence **g**
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- a* was substantially corroborated by that of the respondent's Manager DW2. He also concluded that the testimony of Lee Geok Tian (PW7), an independent witness who also booked for a shoplot about the same time as the appellants, helped to explain the true position. He has taken proper advantage of having seen and heard these witnesses and his conclusion on the facts are well supported by evidence. From the evidence as accepted by the learned Judge, the following facts came to light:
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- (1) On or about 13 July 1979, booking for phase 3 had not been officially opened. Acceptance of booking commenced on 18 October 1979, i.e. about three months later, when booking was officially opened.
- c*
- (2) The appellants at the material time knew booking had not yet been opened as they had been so informed by DW1. The issue of temporary receipts and the keeping of the appellant's cheques by DW1 were done with a view to waiting for the official opening to enable the appellants to make official bookings with the respondents after DW1 had informed them by phone.
- (3) DW1 also showed them the site plan on the wall, allowed them to make a choice of the lot to be earmarked for them and quoted the price of RM250,000.
- d*
- (4) DW1 claimed he was doing these on personal basis as a favour to the appellants who were not strangers to him and in the expectation of obtaining some personal benefit.
- (5) The respondent's Manager (DW2) confirmed that DW1 had no authority to accept bookings for phase 3 project in July 1979. According to him, DW1 was a general clerk assisting in the administration of the office and checking of correspondence relating to progress payments. It was also his duty to request purchasers to come and make payments to the account or booking clerks. There were two booking clerks whose duties were to accept bookings. In the circumstances, it would not be difficult for DW1 to have advised the appellants to go and see them for the purpose of bookings.
- e*
- (6) The real position was explained by DW2. The advertising permit for phase 3 which enabled the respondent to open the phase for booking to the public was approved by the Ministry of Housing on 8 October 1979. Prior to obtaining the advertising permit, no developer could accept any booking. The price of the shophouses had also to be approved by the Ministry. The approved price for a 3½ storey shophouse for phase 3 was RM299,950. The respondent could not sell for more than that price. It was only after the approval that the price was fixed by the respondent at RM295,000. The price of RM250,000 as recorded earlier by DW1 in the receipts could not in the circumstances be the official price.
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- g*
- (7) It would appear that on 18 October 1979 when booking was officially opened, DW1 informed the appellants by phone to come and make their bookings. They were not happy over the price of RM295,000 fixed for one shophouse. They came to see DW1, expressed their annoyance and were later taken to see DW2 in the latter's office. Subsequently, the respondent was prepared to reduce the price by RM10,000.
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- The appellants were still dissatisfied and stuck to the price of RM250,000 as given by DW1 earlier. It was clear therefore that in spite of the appellants' refusal to make purchase bookings because of what had transpired earlier between them and DW1, the respondent was still prepared to offer them at the reduced price of RM285,000. The appellants refused. They then lodged private caveats against the land to prevent the respondent from dealing with the said land.
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- (8) The matter was in fact inquired into by an official of the Ministry of Housing after receipt of complaint from the appellants and an inquiry was held in the Ministry prior to the trial. a
- (9) PW7 was one of the purchasers who agreed with the respondent's offer of the new price and took advantage of the 10% discount by booking for a house at RM285,000, although he had also paid a deposit of RM5,000 through one Mrs. Chew, some time in April 1979. This evidence confirmed that at the material time booking for phase 3 had not yet commenced and the price of RM250,000 fixed then was unofficial. Apparently, it was still premature for bookings to be accepted at that time. When booking was subsequently opened, he agreed to accept the return of RM5,000 cheque and thereafter paid 10% deposit, i.e., RM28,500 on the new price, for which he was issued an official receipt by the respondent. He also executed a sale and purchase agreement with the respondent. b
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Having regard to the facts and circumstances of this case, we agree with the learned Judge that the five receipts issued by DW1 to the appellants were not the official receipts of the respondent nor were they issued by the respondent because they were typewritten copies which bore no letterheads of the respondent. Moreover, such practice was contrary to the normal course of business of the respondent as a licensed housing developer. d

The legal position of a company or a corporation is that being a fictitious person it can only do any act which includes making a representation through its agents or servants. The capacity of such a company is limited by its memorandum and articles of association. In other words, it can act within the ambit of the powers or provisions expressly provided in the memorandum and articles of association. In the ordinary course of business, a third party when entering into a contract with a company normally relies on the authority of an agent of the company. e

Now, the difference between an actual and an apparent or ostensible authority and the principles applicable thereto are adequately explained by Diplock LJ in *Freeman & Lockyer v. Buckhurst Part Properties (Mangal) Ltd.* [1964] 2 QB 480 from p. 502 to p. 504 as follows:

It is necessary at the outset to distinguish between an 'actual' authority or an agent on the one hand, and an 'apparent' or 'ostensible' authority on the other. Actual authority and apparent authority are quite independent of one another. Generally they co-exist and coincide, but either may exist without the other and their respective scopes may be different. As I shall endeavour to show, it is upon the apparent authority of the agent that the contractor normally relies in the ordinary course of business when entering into contracts. f

An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor ... g

An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although h
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- a* he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.
- b* In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the 'actual' authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority.
- c* We are satisfied that in the present appeal, the question as to actual authority did not arise. What was in issue before the learned Judge was whether there was apparent or ostensible authority upon the representation of the respondent as the principal or upon the representation of DW1 as the agent. In this respect, 'the representation' said Lord Diplock:
- d* "Which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into".
- e* It was submitted that DW1 had the implied authority to accept purchase bookings at the material time on behalf of the respondent on the ground that he signed as manager in the correspondence. We noted that in one correspondence (p. 163 of Civil Appeal No. 146 of 1984), DW1 signed on behalf of the manager of the respondent. The letter, however, relates to a developer's notice requesting for progress payment from a purchaser and submitting an architect's certificate showing the completion of foundation work. According to the date 2 June 1978, the letter could well refer to phase 2 and was probably within the duties of DW1 as a general clerk to have done so. There are other similar correspondence signed by DW1
- f* on behalf of the respondent also referring to phase 2 which again, in our view, fall within the duties of DW1 as a general clerk. The only document which relates to the acceptance of a purchase booking fee of RM1,000 signed by DW1 for and on behalf of the respondent on the company's booking form is Ex. D24. That was done on 22 October 1979, i.e., about four days after booking had been opened by the respondent. (See p. 282 of Civil Appeal No. 144 of 1984).
- g* It was also submitted that DW1 could have been authorised to accept bookings by the booking clerks, as admitted by DW2, and in the absence of evidence that the booking clerks were not authorised to delegate. In this regard, the accepted principle is that the 'apparent' authority must be made by someone who had the 'actual' authority to make such representation as empowered by the memorandum and articles of association of the company.
- h* This is normally conferred upon the board of directors or those having the powers of management to delegate authority to some other person. *Freemen's case (supra)* and *British Bank of the Middle East v. Sun Life Assurance Co. of Canada (UK) Ltd.*[1983] 2 Lloyd's Rep 9. If at all the two clerks had delegated their work to DW1, it is apparent that they have no authority to do so in the absence of evidence that they had actual authority to delegate such power to DW1. Similarly, the conduct of the respondent's receptionist in directing the appellants to see DW1 as the person to receive bookings, if such allegations are true, cannot
- i* amount to a representation by the respondent in the circumstances.

It can be seen that in the relevant cases stated below not only the articles of association confer power on the directors to delegate but the person purporting to act for the company was acting within the scope of what would normally be expected to be within the authority of one of his position. (Per William LJ in *Freeman's* case p. 493). It is also well established that all persons dealing with a company are affected with notice of its memorandum and articles of association which are public documents open to inspection by all. (*Mahony v. East Holyford Mining Co.* [1875] LR 869 HL).

In *Clay-Hill Brick & Tile Co. Ltd. v. Rawlings* [1938] 4 All ER 100, a company was held bound by the act of its chairman who acted as managing director though never appointed as such, in receiving cheques from a customer in payment for goods supplied by the company. Similarly, in *Freeman's* case, the act of K, one of the directors of the company in appointing the plaintiff, a firm of architects, to apply for planning permission to develop the estate belonging to the company was within the authority of a managing director of the company; although no such managing director was appointed, the articles of association contained such power to appoint him as such. In contrast is the case of *British Bank of the Middle East (supra)*. There letters of undertaking issued by a branch manager, a junior employee of the respondent insurance company to the Bank were held not to be binding on the insurance company on the ground, *inter alia*, that the branch manager had no authority, express or implied, to execute the undertaking on behalf of the company. It was not a case of the company holding out the branch manager as having its authority, express or implied, to answer the letter in the way he did but rather of the case where he without the knowledge or permission of the insurance company, holding himself out as having such authority. In the case before us, the person alleged to be purporting to act for the respondent was a general clerk and according to the evidence of DW2 the manager, as accepted by the learned Judge, DW1 had no authority to accept booking fees nor to issue receipts on behalf of the respondent. DW1's service was terminated by the respondent some time in September 1980.

In our considered judgment, this was a case where it would not normally be expected to be within the authority of DW1 to act as he did in the circumstances, and any holding out by DW1 at the material time was done without the knowledge and consent of the respondent. We agree with the learned Judge that there was no representation by the respondent that DW1 was authorised to accept bookings on its behalf. The appeal is hereby dismissed with costs and the judgment of the learned Judge is confirmed.

Deposit to the respondent to account for costs.

Also found at [1985] 1 CLJ 533

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